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RECENT CASES.

BILLS AND NOTES—HOLDER IN DUE COURSE—INSTRUMENT MUST BE COMPLETE AND REGULAR ON ITS FACE.—The plaintiff sued on two trade acceptances, expressed as payable November 1st and December 1st, respectively, without specifying the year. The defendant interposed a defense which would not prevail against a holder in due course. *Held*: The plaintiff was not a holder in due course under the N. I. L., sec. 52: "A holder in due course is a holder who has taken the instrument under the following conditions: (1) that it is complete and regular upon its face" *United Railway & Logging Supply Co. v. Siberian Commercial Co.*, 201 Pac. 21 (Wash. 1921).

The only possible objection to an instrument such as the one in the instant case before the Negotiable Instruments Law was the uncertainty as to the due date, but in some cases this objection was removed by considering it as payable on demand. *Collins v. Trotter et al.*, 81 Mo. 275 (1883). *Sil-
over* on Negotiable Instruments, 2d Ed., p. 65. A *dictum* in *Mount Calvary Church v. Albers*, 174 Mo. 331, 73 S. W. 508 (1902), supports the theory on which *Collins v. Trotter et al.*, *supra*, was decided. "In case no time or an uncertain or impossible time is specified for the payment of a note, it is understood to be payable on demand." A few courts, however, disposed of such a problem by reasoning that it was intended to be payable at some time after date and for this reason the jury should decide what time was intended; of course, parol evidence was not admissible to prove the intention of the parties. *Conner et al., v. Routle*, 7 Howard 176 (Miss. 1843); *Nichols v. Frothingham*, 45 Me. 220 (1858).

The court in the principal case based its decision on the theory of *In re Estate of Philpott*, 139 Ia. 555, 151 N. W. 825 (1915), which seems to be the only case decided squarely on this question under the Negotiable Instruments Law. On the other hand, in *Torpey v. Tebo*, 184 Mass. 307, 68 N. E. 223 (1903), a draft drawn, due October 1, was held to be "an unconditional order to pay a sum certain in money, at a fixed future time" and a negotiable bill of exchange under the N. I. L., sec. 1. No question of holder in due course being involved, sec. 52, *id.*, under which the principal case was decided, was not considered.

It is submitted that the decision in the instant case is the only logical view under the N. I. L., sec. 52, for, as was said by the court, "where there is an attempt to fix a due date which is not complete it would seem only reasonable to hold that the instrument is one not complete and regular on its face and the section of the statute requiring it to be such would prevail." If, on the other hand, it is decided that a due date such as the one in the principal case sets forth a "fixed future time," as was the case in *Torpey v. Tebo*, *supra*, it seems it should be held that the instrument is complete and therefore the holder is a holder in due course.

CARRIERS—LOSS OF GOODS—CONSTRUCTIVE DELIVERY.—A shipper left a bale of cotton on defendant's railway platform without notifying defendant's agent. There was a notice posted that the defendant would not be liable for

the loss of goods prior to the issuance of the bill of lading, but it was the custom of the shipper to leave cotton on the platform at various times during the day and to obtain a bill of lading for the whole amount in the evening. The bale of cotton was stolen sometime during the day. *Held*: The defendant was not liable. *Behrmann v. Atlantic Coast Line Ry. Co.*, 109 S. E. 397 (S. C. 1921).

A common carrier's liability for the loss of goods does not arise until the goods are delivered to and accepted by the carrier. *E. L. & R. Ry. Co. v. Hall*, 64 Tex. 615 (1885); *Tate v. Yazoo & M. V. Ry. Co.*, 78 Miss. 842, 29 So. 392 (1901). But there may be constructive delivery. If it is the custom of a carrier to allow shippers of goods to leave them on the platform without notifying the carrier, and the carrier later ships the goods and gives them bills of lading whenever they call for them, the leaving of the goods on the platform is a good delivery, and the carrier's liability attaches from that time. *Merriam v. N. Y., N. H. & H. Ry. Co.*, 20 Conn. 354 (1850); *Meyer v. Vicksburg, Shreveport & Pacific Ry. Co.*, 41 La. Ann. 639, 6 So. 218 (1889); *Washburn Crosby Co. v. Boston & Albany Ry. Co.*, 180 Mass. 252, 62 N. E. 590 (1902).

In the principal case, the court considers the case of *Copeland v. Ry.*, 76 S. C. 476, 57 S. E. 535 (1906), which held the carrier liable under a similar state of facts except that there was no notice posted. The court distinguishes the cases on that ground, yet in the *Copeland* case the same court had approved of the doctrine of constructive delivery. They seem to think that the admitted custom of the shipper in leaving goods on the platform and the acquiescence in this by the defendant in the instant case does not constitute a waiver of the notice.

Thus it would seem in view of the *Copeland* case, *supra*, and the principal case, that by posting such a notice, a carrier may avoid liability for the loss of goods delivered in this manner, even though it acquiesces in such deliveries in apparent disregard of such notice.

CRIMINAL LAW—CRUELTY TO ANIMALS—MISDEMEANOR—NON-INDICTABLE OFFENSE.—A statute defined cruelty to animals as a misdemeanor and provided for summary conviction for its violation. The defendant claimed the right to trial by jury. *Held*: Trial by jury denied. The offense was not a crime at common law and a statute does not make cruelty to animals an indictable offense by defining it as a misdemeanor. *Allen v. Commonwealth*, 77 Pa. Super. 244 (1921).

At common law, generally, animals had no rights and cruelty to them was not punishable criminally. *Waters v. People*, 23 Colo. 33, 46 Pac. 112 (1896); *State v. Bruner*, 111 Ind. 98, 12 N. E. 103 (1887). Intent to injure an owner by cruelty to his animal subjected the wrongdoer to an indictment for malicious mischief, *Cranch. v. State*, 41 Tex. 622 (1874); and cruelty amounting to a nuisance was indictable as such. *U. S. v. Jackson*, 4 Cranch. 483 (U. S. C. C. 1834); *U. S. v. Logan*, 2 Cranch 259 (U. S. C. C. 1821). A few courts extended this last view and made the offense of cruelty to animals indictable as a misdemeanor. *Isaac Ross' Case*, 3 City Hall Rec. 191 (N. Y. 1818); *State v. Briggs*, 1 Aiken 226 (Vt. 1826).

Misdemeanor is a term used for all crimes less than a felony, 4 Bl. Com. 5; 3 Burns Inst. 557, but all crimes were not indictable at common law. *People v. Van Houten*, 13 Misc. 603, 35 N. Y. S. 186 (1895). Some courts hold, however, that an essential characteristic of a misdemeanor is that it should be an indictable offense, *State v. Hunter*, 67 Ala. 81 (1880); others that when the legislature declares that an act is a misdemeanor it states in effect that such an act is an indictable offense, *Son v. People*, 12 Wend. 344 (1834); and it has also been stated that a misdemeanor does not include a multitude of offenses over which magistrates have an exclusive summary jurisdiction. 2 Bouv. Law Dict.

Differences in constitutional provisions cause a lack of uniformity in the decisions regarding the right to trial by jury. There are decisions to the effect that the legislature may deny the right for any newly created offense. *Tims v. State*, 26 Ala. 165 (1855); *Comm. v. Andrews*, 211 Pa. 110, 60 Atl. 554 (1905). This doctrine is generally disapproved. *Ex parte Wong You Ting*, 106 Cal. 296, 39 Pac. 627 (1895). The better rule seems to be that an offense unknown before the adoption of a constitution is triable by jury or not according to its status as naturally falling within a class of offenses that were or were not theretofore so tried, *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516 (1892); and that the right should not be determined by the punishment or description of the offense. *Callon v. Wilson*, 127 U. S. 540, 32 L. ed. 223 (1887).

The principal case is in accord with the Pennsylvania rule that the legislature may determine the procedure in any newly created offense, *Comm. v. Andrews*, *supra*, but the rule seems to be widely disapproved and it does seem that some limit should be observed so that punishments of a grave character cannot be prescribed with a denial of the right to trial by jury.

CRIMINAL LAW—LOST TRANSCRIPT—NEW TRIAL DENIED.—Appellants were convicted of rape and appealed. By statute they were entitled to a transcript of the court reporter. The reporter died before the notes were transcribed. A clerk's transcript was furnished by order of the court. *Held*: New trial denied. *State v. Ricks*, 201 Pac. 827 (Idaho 1921).

In some jurisdictions it is held that the Supreme Court has power to grant a new trial in the exercise of its original jurisdiction where a party has lost the benefit of a bill of exceptions through no fault of his own. *Borrowscale v. Bosworth*, 98 Mass. 34 (1867); *State v. Reed*, 67 Mo. 36 (1877); *Bailey v. U. S.*, 3 Okl. Cr. 175, 104 Pac. 917 (1909). In England, under Statute 13 Edward I, a new trial may be granted under such circumstances. *Newton v. Boodle*, 3 Com. B. 795, 136 Eng. Reprint 318 (1847). In a former trial of the principal case, however, the Idaho supreme court held it had no such power in the exercise of its original jurisdiction. *State v. Ricks*, 32 Idaho 232, 180 Pac. 257 (1919).

Whether or not the supreme court can and should grant a new trial in the exercise of its appellate jurisdiction was the question in the principal case. The decision of the majority of the court, that it had no such power, is upheld in a number of states. *Alley v. McCabe*, 147 Ill. 410, 35 N. E. 615 (1893); *Etchells v. Wainwright*, 76 Conn. 534, 57 Atl. 121 (1904); *Stenog-*

rapher Cases, 100 Me. 271, 61 Atl. 782 (1905); Peterson v. Lundquist, 106 Minn. 339, 119 N. W. 50 (1908); People v. Botkin, 9 Cal. App. 244, 98 Pac. 861 (1908); Dumbarton Realty Co. v. Erickson, 143 Iowa 677, 120 N. W. 1025 (1909).

In the case of Richardson v. State, 15 Wyo. 465, 89 Pac. 1027 (1907), it was held that the supreme court had the power to grant a new trial in the exercise of its appellate jurisdiction under such circumstances as exist in the principal case. This view was adopted by the dissenting justices in the principal case and is supported by many cases. People *ex rel.* Wright v. Judge of Superior Court of Detroit, 41 Mich. 726, 49 N. W. 925 (1879); Sanders v. Norris, 82 N. C. 243 (1880); Tegler v. State, 3 Okl. Cr. 595, 107 Pac. 949 (1910).

The majority of the court in the principal case hold, with respect to Art. 5, sec. 13 of the Idaho Constitution (which gives the supreme court original jurisdiction to issue any writ necessary to the exercise of its appellate jurisdiction), that this does not impliedly give the power to reverse the judgment and grant a new trial when the method of supplying the record, provided by statute, is ineffective. This view opposes that of the Wyoming Court in Richardson v. State, *supra*, where it was held that such power was incidental to the power to compel a correct record to be sent up. The latter view was adopted by the minority in the principal case.

According to Art. 5, sec. 9 of the Idaho Constitution and C. S. 9086, the appellate power is to "review . . . and to reverse, affirm or modify . . . and may, if proper, order a new trial." The majority of the court said that this section implied that error must be committed by the court below and unless error were shown, there was nothing calling for the exercise of the power to reverse the judgment on appeal.

The view of the majority of the court, considering the fact that a clerk's transcript was available, commends itself to reason and seems thoroughly sound.

CONFLICT OF LAWS—STATUTE OF FRAUDS—LEX LOCI CONTRACTUS.—Plaintiff, a Pennsylvania corporation, made an oral contract to sell sugar, valued at about \$3000 to defendant, a Delaware corporation. The contract was made and to be performed in Pennsylvania. Defendant failed to perform and the plaintiff sued in Delaware. Defendant pleaded the Pennsylvania Sales Act and plaintiff demurred generally. Held: Plaintiff cannot recover. Sec. 4, Pennsylvania Sales Act, Act of May 19, 1915, P. L. 543, relates to the validity of the contract and therefore the *lex loci contractus* governs. Franklin Sugar Refining Co. v. Holstein Harvey's Sons, Inc., 275 Fed. 622 (D. C. 1921).

This construction is in accord with the weight of authority of the courts in construing statutes of frauds and represents that adopted by the Pennsylvania courts. Manufacturer's Light & Heat Co. v. Lamp *et al.*, 269 Pa. 517, 112 Atl. 679 (1921); Mason-Heflin Coal Co. v. Currie *et al.*, 270 Pa. 221, 113 Atl. 202 (1921).

However, in those states where the statute provides "no action shall be brought . . ." there has been a marked difference of opinion as to whether the statute goes to the validity of the contract or merely to the

remedy. If it affects the validity, it is generally held that the *lex loci contractus* governs. *Murdock v. Calgary Colonization Co.*, 193 Ill. App. 295 (1916); *Matson v. Bauman*, 139 Minn. 396, 166 N. W. 343 (1918). Whereas if it is interpreted as a matter of procedure, the *lex fori* governs. *Third National Bank of New York v. Steel*, 129 Mich. 434, 88 N. W. 1050 (1902); *Boone et al. v. Coe*, 153 Ky. 233, 154 S. W. 900 (1913); *Barbour v. Campbell*, 101 Kan. 616, 168 Pac. 879 (1917).

The English Statute of Frauds (29 Car. II, c. 3), from which are patterned practically all our statutes of frauds, has given rise to a distinction based upon the different wording of two sections therein. Sec. 4 reads, "No action shall be brought" Sec. 17 reads, "No contract shall be allowed to be good. . . ." In *Leron v. Brown*, 12 C. B. 801 (Eng. 1852), construing sec. 4, the court held that it related to the remedy and therefore the *lex fori* applied, but they said that sec. 17 was clearly not equivalent to sec. 4, since the contract was valid and enforceable in France where it was made.

This distinction has been upheld in Connecticut, Kentucky and Michigan where the same construction prevails. *Downer v. Cheesebrough*, 36 Conn. 39 (1869); *Third National Bank of New York v. Steel*, *supra*.

In Arkansas, Indiana, Illinois, Tennessee and Pennsylvania, the distinction has been ignored and it is held that such language as appears in the two sections of the English statute, *supra*, is intended to affect the validity of the contract. *Ringgold v. Newkirk*, 3 Ark. 96 (1840); *Anderson v. May*, 10 Heisk. 84 (Tenn. 1872); *Cochran v. Ward*, 5 Ind. App. 89, 29 N. E. 795 (1892); *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111 (1893).

In view of the language of the Pennsylvania statute (" . . . shall not be enforceable"), the construction by the Pennsylvania courts, adopted in the instant case, leaves no room for doubt that they deem it desirable that any contract not within its terms be invalid.

DAMAGES—JUDICIAL NOTICE—IMPAIRED PURCHASING POWER OF DOLLAR.—In an action for damages the counsel for the plaintiff argued that in assessing damages the jury should consider the impaired purchasing power of the dollar. The court instructed that, without evidence regarding it, it might be considered by the jury. *Held*: It was proper so to instruct the jury, at least so far as pecuniary losses such as the loss of time, loss of earning power, expense and the like are concerned. *Holloran v. New England Telegraph & Telephone Co.*, 115 Atl. 143 (Vt. 1921).

The object of damages is to award a fair compensation for the injuries received. It is generally known that the purchasing power of the dollar varies, and it is competent for a jury to consider such a condition, in arriving at a fair amount of compensation for the injuries sustained. *Washington & R. Ry. Co. v. LaFourcade*, 48 D. of C. App. Cas. 364 (1919); *Louisville & N. Ry. Co. v. Scott's Adm'r's.*, 188 Ky. 99, 220 S. W. 1066 (1920).

In comparing present and past verdicts judicial notice has been taken of the well-known decreased purchasing power of the dollar in deciding whether a verdict was excessive. *Hurst v. Chicago, B. & Q. Ry. Co.*, 280 Mo. 566, 219 S. W. 566 (1920); *Melish v. New York Consol. Ry. Co.* 178 N. Y. S.

228 (1919). And where on second trial the lower court refused to reduce a verdict to the amount to which it reduced the first verdict, it was decided that this was not an abuse of discretion, because in the intervening period economic conditions had reduced the purchasing power of the dollar. *Phila. & R. Ry. Co. v. McKibbin*, 259 Fed. 476, 170 C. C. A. 452 (1919). When economic conditions were reversed, judicial notice was taken of the *increased* purchasing power of the dollar in deciding whether a verdict was excessive. *Johnson v. St. Paul City Ry.*, 67 Minn. 260, 69 N. W. 900, (1897).

Judicial notice has been taken of the well-known increase in the cost of living where a petition for an increase in the allowance for the maintenance of a minor was being heard. *In re Wilmer*, 137 Md. 29, 111 Atl. 118 (1920); likewise where the petition was for an increase in the amount of alimony, *McCaddin v. McCaddin*, 116 Md. 567, 82 Atl. 554 (1911); and the decreased purchasing power of the dollar in the real estate market was judicially noticed as a ground for refusing specific performance of a contract for the sale of land. *Schefrin v. Wilensky*, 111 Atl. 660 (N. J. 1920).

The instruction in the principal case allows the jury to consider a fact of which the courts have universally taken judicial notice. This fact should be considered to make the verdict a fair compensation for the injury sustained; and the objection, in the minority opinion, that it gives the jury a too wide field of conjecture seems a remote danger.

DIVORCE—NEW TRIAL GRANTED AFTER DEATH OF LIBELANT.—The respondent in a divorce suit petitioned for a new trial but before a hearing was had the libelant died. *Held*: A new trial will be granted notwithstanding the death of the libelant since property rights are involved. *Tarbox v. Tarbox*, 115 Atl. 164 (Me. 1921).

The general rule is that if the property rights of the survivor are affected by the decree of divorce, the decree itself may be assailed, if it is for any reason void or voidable. *Fidelity Ins. Co.'s Appeal*, 93 Pa. 242 (1880); *Wood v. Wood*, 136 Ia. 128, 113 N. W. 492 (1907); *Gato v. Christian*, 112 Me. 426, 92 Atl. 489 (1914). The administrators and the heirs of the deceased and all those whose property rights might be affected are often held to be necessary parties in such an action. *Rawlins v. Rawlins*, 18 Fla. 345 (1881); *Groh v. Groh*, 35 N. Y. Misc. 354 (1901). If, however, there are no property rights involved the decree will generally be considered immutable. *Barney v. Barney*, 14 Ia. 189 (1862); *Kirschner v. Dietrich*, 110 Cal. 503, 42 Pac. 1064 (1895). One case has been found which decides that the question of property rights need not be investigated before the decree can be annulled. *Brown et al. v. Grove*, 116 Ind. 84, 18 N. E. 387 (1888).

Missouri and Washington seem to be the only two jurisdictions in which the decisions are squarely *contra* to the general rule, as set forth in the principal case. In *Dwyer v. Nolan*, 40 Wash. 459, 82 Pac. 746 (1905), the court reasoned that since death terminates the marriage relation, there are no proper parties to a motion to vacate the decree and therefore the question of divorce cannot be relitigated. In *Lieber v. Lieber*, 239 Mo. 1, 143

S. W. 438 (1912), the court came to the same conclusion—"A judgment in a divorce suit is one *in rem*. That judgment *in rem* or dissolved relationship would not descend to the heirs, nor would it pass into the hands of his executor or administrator. Consequently there could be no such person or thing represented in any such suit after one of the parties thereto has died." There is a *dictum* in *Owens v. Sims*, 3 Coldw. 544 (Tenn. 1866) which supports this conclusion but the case was decided on a statute, and therefore it cannot be said as a certainty that the Tennessee courts would follow the minority rule.

A divorce suit is generally classified as one in equity, Nelson on Divorce & Separation, Vol. 1, sec. 6, and for this reason equitable principles should be applied. It is submitted that it would be inequitable, to say the least, if the respondent would be precluded from assailing the decree when his or her property rights are involved.

LIBEL.—DEFAMATORY STATEMENTS ABOUT A DECEASED RELATIVE.—In an action for libel the plaintiff seeks to recover damages for her mental suffering and distress caused by the libel of her deceased brother. The libel was that plaintiff's deceased brother was illegitimate. *Held*: There is no cause of action. The libelous statement injured the reputation of the deceased, and the right of action lay in the deceased alone. Such a libelous statement causes mental distress to all the relatives and even friends of the deceased and to allow this plaintiff to recover would be to recognize a right of action in all the friends and relatives of the deceased. *Saucer et ux. v. Giroux*, 202 Pac. 887 (Calif. 1922).

The libel of a dead person is a misdemeanor at common law, if it is alleged that it was done with intent to bring his family into contempt, *R. v. Critchley*, 4 T. R. 129 (Eng. 1734); *R. v. Topham*, 4 T. R. 126 (Eng. 1791); but not if the injury is only to deceased's character and brings no contempt on his family. *R. v. Ensor*, 3 Times L. R. 366 (Eng. 1886). A parent cannot recover for injured feelings caused by libel of a deceased child, where the parent's reputation is not affected. The parent's injured feelings are the same whether the child be dead or alive, and the parent cannot sue for the libel of a living child, nor as the representative of the deceased, since the injury of the reputation of the deceased did not injure his estate. *Bradt v. New Nonpareil Co.*, 108 Iowa 449, 79 N. W. 122 (1899); *Sorensen v. Balaban*, 11 App. Div. 164, 42 N. Y. 654 (1896). A defamatory statement made to the child alone might cause similar mental suffering but does not give *any* cause of action because there is no injury to reputation. *Sorensen v. Balaban*, *supra*. A defamatory statement that a husband died as a result of suicide does not give the wife a right of action. An aspersion on a deceased person cannot give anyone else the right to recover for the wrong done the deceased, and there is no authority which allows a wife to bring an action to recover for her injured feelings. *Broome v. Ritchie*, 6 Sess. Cas. 942 (Scot. 1904). The mental distress caused by the libel of a deceased relative cannot be the basis of a civil action. *Wellman v. Sun Printing & Publ. Assn.*, 66 Hun. 331 (N. Y. 1892); *Sprocki v. Stahl*, 14 Cal. App. 1, 110 Pac. 957 (1910).

It would seem clear that the plaintiff in the principal case cannot recover for her mental suffering and distress, but in all the cases cited above, the defamatory statement referred to some wrongful act of the deceased, while in the principal case the defamatory statement tends to cast a reflection upon the deceased's family. As a consequence it would seem possible that the plaintiff's own reputation may have been injured. Two persons may be so related that an accusation against one necessarily affects the personal character of another. *Vicars v. Worth*, 1 Strange 471 (Eng. 1722); *Hodgkins v. Corbet*, 1 Strange 545 (Eng. 1723). Where the plaintiff's sister was falsely accused of committing larceny, the plaintiff was allowed to recover, the court saying that to write that the plaintiff is the brother of the sister arrested for larceny may well be considered by a jury to impair his standing in the community. *Merrill v. Post Publ. Co.*, 197 Mass. 185, 83 N. E. 419 (1908). In that case, the plaintiff's name was mentioned in the libel, but there was no direct defamation of the plaintiff's character.

Applying the above authorities to the facts of the principal case, the plaintiff may have a right of action for injury to her own reputation. The plaintiff did not base her action on this ground, however, and consequently the decision is in accord with the great weight of decided cases.

MORTGAGES—RIGHT OF REDEMPTION—STATUTE OF LIMITATIONS.—The plaintiffs claim right to certain property through one E. T. Tate, who had executed a mortgage thereon for the benefit of the defendant, the terms of which provided that if there should be a default in the payment of the debt by a certain date the mortgagee should enter under clear title. Plaintiffs bring an action, as heirs of E. T. Tate, to obtain the property and also have defendant account for rents, profits, etc. *Held*: The instrument executed by E. T. Tate was a mortgage and not a deed and the defendant could take no title thereby. The plaintiffs should therefore be allowed to recover the property. *Frady v. Ivester*, 110 S. E. 135 (N. C. 1921).

The general rule is that the mortgagor or those claiming under him may bring a bill in equity to redeem property in the possession of the mortgagee, praying at the same time for an account of the rents, profits, etc., which accrued while the mortgagee was in possession. *Horn v. Indianapolis National Bank*, 125 Ind. 381, 25 N. E. 558 (1890); *Beekman v. Frost*, 18 Johns 544 (N. Y. 1820). Most states have statutes fixing the time within which an action to redeem must be brought or else the right will be lost. *Lindberg v. Thomas*, 137 Ia. 48, 114 N. W. 562 (1908); *Hughes v. Edwards*, 9 Wheaton 488 (U. S. 1824); *McNair v. Lot*, 34 Mo. 285 (1863). The period is usually twenty years, *Hughes v. Edwards*, *supra*, although in some states it is less. *Mahaffy v. Faris*, 144 Ia. 220, 122 N. W. 934 (1909). But even in the absence of any statutes it has been held that since the right to redeem is of equitable cognizance, it might be lost through laches. *Deadman v. Yantis*, 230 Ill. 243, 82 N. E. 592 (1907).

In the principal case the mortgagee had been in possession without giving any rents or profits for over twenty years. The court, however, was of the opinion that the said mortgagee was not holding adversely to the

mortgagor's interest on account of the agreement in the mortgage giving the mortgagee the possession on the mortgagor's default. In their view the mortgagee was holding in subordination to and with the permission of the mortgagor, and hence was not holding adversely. It is submitted that by the very terms of the mortgage the mortgagee was to hold adversely in case of default in payment by the mortgagor. If this is the proper construction, and a very vigorous dissenting opinion takes this view, it would seem then that the statutory period had run against the plaintiff's claim for redemption.

NEGLIGENCE—EXPLOSIVES—PROXIMATE CAUSE—INFANT TRESPASSERS.—The plaintiff's thirteen-year-old son, while playing on the defendant's lot, where boys were accustomed to play, found dynamite caps in a wooden box. Four days later he took the caps to the home of his grandmother, sixty miles away and in another state, where he was killed the following day by the explosion of one of the caps, out of which he had tried to pry the explosive substance with a hat pin. *Held*: The defendant is liable for the death of the plaintiff's son. *O'Brien v. Fred Kroner Hardware Co.*, 185 N. W. 205 (Wis. 1921).

It is a general rule that a landowner owes no duty to trespassers except the duty not wilfully or intentionally to inflict injury upon them. *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369 (1889); *Schmidt v. Bauer*, 80 Cal. 565, 22 Pac. 256 (1889); *Thompson on Negligence*, Vol. I, p. 303. To infant trespassers, however, some courts hold that he does owe a duty of care and must protect them from dangerous instruments, particularly those attractive to their natural instincts of play. *Sioux City, etc. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745 (U. S. 1873); *Keffe v. Milwaukee, etc., R. Co.*, 21 Minn. 207 (1875); *Edgington v. Burlington, etc. R. Co.*, 116 Ia. 410, 90 N. W. 95 (1902). This is the so-called "doctrine of the Turntable Cases," a doctrine that has been criticized by some courts and openly repudiated by others, *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 9 Atl. 790 (1886); *Daniels v. New York & New England R. R. Co.*, 154 Mass. 349, 28 N. E. 283 (1891); *Ryan v. Towar*, 128 Mich. 463, 87 N. W. 644 (1901); and which has been confined by a few courts to the field of its original application, *i. e.*, to railroad turntables. *Mergenthaler v. Kirby*, 79 Md. 182, 28 Atl. 1065 (1894); *Smith v. Dold Packing Co.*, 82 Mo. App. 9 (1899); *Harris v. Cowles*, 38 Wash. 331, 80 Pac. 537 (1905).

Other courts, however, have extended this "turntable doctrine" to classes of dangerous instruments other than turntables, and so the leaving of explosives accessible to children has been held to be negligence. *Mattson v. Minnesota, etc., R. Co.*, 95 Minn. 477, 104 N. W. 443 (1905); *Olson v. Gill Home Investment Co.*, 58 Wash. 151, 108 Pac. 140 (1910); *Folsom-Morris Coal Min. Co. v. De Vork*, 61 Okl. 75, 160 Pac. 64 (1916).

Although few courts clearly state it, such negligence, nevertheless, must be shown to be the proximate cause of the injury complained of in order to hold the defendant liable. The principal case holds the defendant's negligence to be the proximate cause in spite of the act of the boy in exploding the cap and in spite of the time and space that intervened between the taking of the explosive and the explosion itself.

Some courts hold that the act of a child in exploding a dynamite cap or torpedo breaks the chain of causation between the negligence and the injury, *Afflick v. Bates*, 21 R. I. 281, 43 Atl. 539 (1889); *Horan v. Watertown*, 217 Mass. 185, 104 N. E. 464 (1914); *Hale v. Pacific Tel., etc., Co.*, 42 Cal. App. 55, 183 Pac. 280 (1910); but the majority rule is that the causal connection remains unbroken by the intervening act of the child. *Harriman v. Pittsburgh, etc., R. Co.*, 45 Ohio St. 11, 12 N. E. 451 (1887); *Makin v. Piggott*, 29 Can. S. C. 188 (1898); *Nelson v. McLellan*, 31 Wash. 208, 71 Pac. 747 (1903).

There have been cases, too, where the defendant has been held not liable because considerable time had elapsed between the asportation of the explosive and the injury, *Carpenter v. Miller*, 232 Pa. 362, 81 Atl. 439 (1911); *Jacobs v. New York, etc., R. Co.*, 212 Mass. 96, 98 N. E. 688 (1912); *Perry v. Rochester Lime Co.*, 219 N. Y. 60, 113 N. E. 529 (1916), but other cases sustain the view that the mere intervention of time will not render the cause remote. *Akin v. Bradley Engineering & M. Co.*, 48 Wash. 97, 92 Pac. 903 (1907); *Eckart v. Kiel*, 123 Minn. 114, 143 N. W. 122 (1913); *Barnett v. Cliffside Mills*, 167 N. C. 576, 83 S. E. 826 (1914).

There seems to be no case, however, in which the explosive has been carried away for a great distance and then exploded by the child. In most of the cases, the explosion of the dynamite caps or torpedoes has taken place reasonably near to the defendant's premises. There appears to be no logical reason, however, why the defendant in the principal case should not be held liable, even if the explosion happened sixty miles distant, and in another state, as long as it was a consequence which he as a prudent man should reasonably have anticipated.

So, the principal case, decided by a court which has recognized the liberal application of the "turntable doctrine" in *Brinilson v. C. & N. W. R. Co.*, 144 Wis. 614, 129 N. W. 664 (1911); *Meyer v. Menominee & M. L. C. T. Co.*, 151 Wis. 279, 138 N. W. 1008 (1912); *Herrem v. Konz*, 165 Wis. 574, 162 N. W. 654 (1917); shows no departure from the existing law.

NEGLIGENCE—INJURIES TO CHILDREN—"ATTRACTIVE NUISANCES."—The motorman left one of defendant's cars standing in the street with its trolley pole tied down to the top of the car, the switch at both ends of the car turned off, the brakes set, the doors locked, and he carried away the controller. It was in a neighborhood where children were accustomed to play in the street. Children broke into the car and started it with an improvised controller. The plaintiff, a boy of three, was crushed between the car, on which he and the other children were riding, and another car on the same track. *Held*: The plaintiff cannot recover, as the defendant took proper precautions to prevent children from moving the car and injuring themselves. *Kressine v. Janesville Traction Co.*, 184 N. W. 777 (Wis. 1921).

The doctrine of attractive nuisance seems to have arisen in the first instance in the English case of *Lynch v. Nurdun*, 1 Q. B. 29 (Eng. 1841); but the doctrine was not taken up in the United States until 1873. *Stout v. Sioux City & P. R. Co.*, 17 Wall. 657 (U. S. 1873). The last named case

was the first of the so-called "turntable cases." In that case it was decided that the railroad company was negligent in not keeping its turntable locked when children were known to be in the habit of playing about it. Many states adopted the rule as laid down by the United States Supreme Court in *Stout v. Sioux City, etc., R. Co.*, *supra*. *O'Malley v. St. P., etc., R. Co.*, 43 Minn. 289, 45 N. W. 440 (1890); *Barrett v. Southern Pacific R. Co.*, 91 Calif. 296, 27 Pac. 666 (1891). The cases that adopt the principle rely for the most part on the theory that there is an implied invitation to the child due to the attraction of the machine. *Chicago & E. R. Co. v. Fox*, 38 Ind. App. 268, 70 N. E. 81 (1904). A number of jurisdictions refused to adopt the turntable doctrine on the ground that the railroad company owed no duty to a trespasser except to protect him from active violence; and refused to regard children of tender years as a privileged class. *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 39 N. E. 1068 (1895); *Thompson v. R. R.*, 218 Pa. 444, 67 Atl. 768 (1907). It is a peculiar coincidence that many states which approved of the principle as laid down in *Stout v. R. R.*, *supra*, have limited the liability to cases related very closely to the turntable cases, while states that refused to adopt the rule as applied to turntables have been more liberal in applying the same rule to facts that are almost identical to the turntable cases. Thus many courts refused to extend the turntable doctrine to cases where the attractive object is one which has nothing to do with a child's love of motion, *Erickson v. Great Northern Ry. Co.*, 82 Minn. 60, 84 N. W. 462 (1900); *Etheredge v. Central R. Co.*, 122 Ga. 853, 50 S. E. 1003 (1905). Pennsylvania has never adopted the attractive nuisance doctrine in respect to turntables, but gives infant trespassers very liberal protection when playing in other dangerous places. *Carr v. So. Traction Co.*, 253 Pa. 274, 98 Atl. 554 (1916). Almost every jurisdiction refuses to regard standing cars as attractive nuisances, even though they are unbraked on a track near where children are known to play. *Buddy v. Union Terminal Ry. Co.*, 276 Mo. 276, 207 S. W. 821 (1918); *Colby v. Chi. Junc. Ry. Co.*, 216 Ill. App. 315 (1920). The California Supreme Court, on the other hand, allowed a boy of twelve to recover when he was injured while pushing an unbraked hand-car. *Cahill v. Stone & Co.*, 153 Cal. 571, 96 Pac. 84 (1909). The latter case seems to stand alone in its extension of the rule of attractive nuisances to cars left standing unbraked on the track. The principal case seems to be in accord with the weight of authority, and it would be going far indeed to say that the defendant had not taken all the reasonable steps to prevent the injury which occurred.

NEGLIGENCE—LIABILITY OF LANDOWNER FOR NEGLIGENT ACTS INJURING TRAVELER ON HIGHWAY.—The defendant company owned a lot adjoining a highway, and permitted its employees to play ball there during the noon hour. The plaintiff, an employee of the company, was struck in the back by a batted ball as she was returning to her work along the adjoining highway. *Held*: The plaintiff cannot recover, as the defendant was not negligent in allowing its employees to play ball. *Harrington v. Border City Mfg. Co.*, 132 S. E. 721 (Mass. 1921).

The owner of land can only use his property in such a way as not to infringe upon the rights of anyone to whom he owes a duty. Thus an occupant of premises adjoining a highway owes a duty to pedestrians to use his premises in such a manner as not to expose unreasonably such a traveller to unsafe conditions. The traveling public has a right to make free use of a highway, which right the abutting owner must safeguard by maintaining the structures upon his land in safe condition, and by a reasonable use thereof. *Goodin v. Fuson*, 22 Ky. 873, 60 S. W. 293 (1900); *Sorrero v. Pennsylvania R. Co.*, 86 N. J. L. 642, 92 Atl. 604 (1914). The courts will never presume that there has been negligence from the mere fact that an injury has been received, but an injury may occur under such circumstances that the courts are justified in making "an inference or presumption of negligence." Thus one in possession and control of buildings past which travellers must walk, is under a duty to exercise care to prevent articles from falling upon passers-by. *Stair v. Kane*, 156 Fed. 100 (C. C. 1907); *Bannigan v. Woodbury* 158 Mich. 206, 122 N. W. 531 (1909). Whether there has been negligence in the use of land is usually a question for the jury, and this involves an interpretation of the facts in each particular case. *Wolf v. Des Moines*, 126 Iowa 659, 102 N. W. 517 (1905); *Roth Packing Co. v. Williams*, 3 Ohio App. 348 (1914).

The tendency of the later cases is to enforce a strict degree of care upon the owner of property in respect to persons upon the public highway, or on adjacent land. The court in the principal case, however, refused to apply the rule of *Stair v. Kane*, *supra*. It is submitted that the use of the land in the principal was in the nature of a nuisance. Pedestrians were under constant danger of being struck by a batted ball, and the defendant did nothing to avert the danger. If one permits his land to be used for such purposes he should be required to take positive measures to protect passers-by, and a failure to do so should in the event of resulting injury make him liable in an action for damages.

NEW TRIAL—INCOMPETENCE OF ATTORNEY.—Because of his ignorance, counsel for the defendant was unable to impeach the state's evidence. *Held*: In view of the fact that the state's evidence was inconclusive, a new trial was granted because of counsel's ignorance. *People v. Schulman*, 132 N. E. 530 (Ill. 1921).

The decision in the principal case is contrary to the strict rule that a person free to choose his own attorney must take the consequences of that attorney's want of skill or learning. *State v. Dreher*, 137 Mo. 11, 38 S. W. 567 (1897); *Edwards v. Territory*, 8 Ariz. 342, 76 Pac. 458 (1904); *People v. Barnes*, 270 Ill. 574, 110 N. E. 881 (1915). A blind adherence to this rule would in many criminal cases lead to harsh injustice and, therefore, not desiring deliberately to sacrifice life or liberty most courts qualify the rule. They hold that a new trial will not be granted unless it is shown that the defendant has been vitally prejudiced. *Comm. v. Benesh*, Thach. Crim. Cases 688 (Mass. 1842); *State v. Bengé*, 61 Iowa 658, 17 N. W. 100 (1883); *Hudson v. State*, 76 Ga. 727 (1886). So great, however, must the prejudice be that courts have found counsel's mere intoxication

or insanity insufficient. *O'Brien v. Comm.* 115 Ky. 608, 74 S. W. 666 (1903); *State v. Bethune*, 93 S. C. 195, 75 S. E. 281 (1912). Cases in which the prejudice done to the defendant's case has been found sufficient are very few. A new trial was granted in *State v. Jones*, 12 Mo. App. 93 (1882), which was strongly disapproved of in *State v. Dreher*, *supra*.

In civil cases because of the absence of any conscientious scruples concerning human life and liberty the rule is more strictly enforced against the appellant and there are very few implications that any exceptions are possible. The feeling is that since only property is involved the owner is bound by the conduct of those whom he employs to take care of it. *Jones v. Leech*, 46 Iowa 186 (1877); *De Florey v. Reynolds*, 16 Blatchf. 397 (U. S. C. C. 1879); *In re Quinn's Estate*, 5 N. Y. S. 261 (1889); *Malry v. Grant*, 48 S. W. 614 (Texas 1898).

In England, however, where counsel was negligently absent a new trial was granted upon payment of the costs of the former trial. *De Rouffigny v. Peale*, 3 Taunt. 484 (Eng. 1811); *Fourdrinier v. Bradbury*, 3 B. & Ald. 328 (Eng. 1820). There was also an exception to the general rule in *Kimball Co. v. Huntington*, 80 Wis. 270, 50 N. W. 177 (1891) which allowed a new trial because of counsel's negligence.

The strict rule appears to be a necessary one for practical reasons. As pointed out in *Jones v. Leech*, *supra*, it would be very unsatisfactory for the courts to be compelled to adjudicate upon the skill and learning of attorneys. In that case the court stated that by forcing the responsibility upon the client and thus encouraging a careful choice of counsel the client's interests will be better protected and the more learned members of the profession will be rewarded.

The principal case seems to be one of the few in which the court was compelled to say that the defendant was essentially prejudiced and finding so it took the more liberal view and granted a new trial. However, in view of the decision in *People v. Barnes*, *supra*, it seems to have departed from precedent in the particular jurisdiction.

SPECIFIC PERFORMANCE—PAROL CONTRACT FOR LAND—STATUTE OF FRAUDS.—Plaintiff sues her sister's administrator for the specific performance of a parol contract by which the sister promised to leave plaintiff her homestead, if the latter would come to live with her and care for her. *Held*: The plaintiff was entitled to specific performance. *Colby v. Street*, 185 N. W. 954 (Minn. 1921).

The weight of authority is in accord with this decision, the majority rule being, that a parol contract for the sale of land or to leave it by will is taken out of the statute of frauds by performance by the promisee, if the services rendered are of such a personal character that it is impossible to estimate their value by any pecuniary standard, and if the promisee cannot be restored to his former situation or compensated in damages. *Hinkle v. Hinkle*, 55 Ark. 583, 18 S. W. 1049 (1892); *Brinton v. Van Cott*, 8 Utah 480, 33 Pac. 218 (1893); *Hall v. Harris*, 145 Mo. 614, 47 S. W. 506 (1908). Other cases grant specific performance where there has been such performance by the promisee that it would be fraud on him if it were

not granted. *Vreeland v. Vreeland*, 53 N. J. Eq. 387 (1895); *McCabe v. Healy*, 138 Cal. 81, 70 Pac. 1008 (1902).

The minority view is that the plaintiff must enter into possession of the land in reliance on the contract, and that the rendering of services and change of position by him is not enough. In *Grant v. Grant*, 63 Conn. 530, 29 Atl. 15 (1893), a girl went to live with a man and his wife on an oral promise that she would be left all their property when they died. She lived with them for nineteen years, and yet the court refused to grant specific performance, as she was never in possession. An even stronger case is *Devinney v. Corey*, 52 Hun. 612, 5 N. Y. S. 289, affirmed in 127 N. Y. 655, 28 N. E. 254 (1889), where plaintiff and her husband went to live with her parents to help and care for them, in return for which the father promised to convey his land to plaintiff. The court held there was no such performance as would take the case out of the statute. The leading English case, *Maddison v. Alderson*, L. R. 8 App. Cas. 467 (Eng. 1883), is in accord with these cases, and is cited with approval in *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252 (1889).

The principal case follows the doctrine laid down in Minnesota in the case of *Svanburg v. Fosseen*, 75 Minn. 350, 78 N. W. 4 (1889), which is in accord with the majority rule stated above, but the Minnesota cases are very insistent that the acts claimed as performance must be done in reliance on the contract. *Stellmacher v. Bruder*, 89 Minn. 507, 95 N. W. 324 (1903); *Kins v. Ginzky*, 135 Minn. 327, 160 N. W. 868 (1917).

SURETYSHIP—PARTIAL DISCHARGE OF OBLIGATION—SUBROGATION.—Section 3466 Revised Statutes gives the United States priority over other creditors. Section 3468 provides that when a surety pays to the United States the debt of an insolvent principal he shall have "a like priority." The National Surety Company was surety to the extent of \$3150 on a debt of \$13,000 due the United States. On being forced to pay its guaranty it claimed the right to prove for that amount against the insolvent estate of the principal debtor on an equality with the United States. *Held*: The surety company is not entitled to prove equally with the United States. *United States v. The National Surety Company*, 41 Sup. Ct. 29 (1920).

The general rule is that where a surety has discharged the obligation of the principal, he has the right and equity to be subrogated to the rights of the creditor with respect to any security which he holds against the principal. *Liles v. Rogers*, 113 N. C. 197, 18 S. E. 104 (1893); *Brown v. Rouse*, 125 Cal. 645, 58 Pac. 267 (1899); *Colt v. Sears Commercial Company*, 20 R. I. 64, 37 Atl. 311 (1897). However, by the majority rule subrogation is not allowed to work loss or injury to a lien or preferred creditor whose claim has not been wholly discharged, although the surety may have paid in full his obligation for part of it. *National Bank v. Rockefeller*, 174 Fed. 22 (1909); *Child v. New York & New England R. R. Co.*, 129 Mass. 170 (1880); *Knaffel v. Banking Company*, 133 Tenn. 65, 179 S. W. 629 (1915); *Ex parte Rushforth*, 10 Vesey Jr. 409 (1805). If a surety, in making partial payment, should become entitled to subrogation *pro tanto*, it would operate to place such surety upon a footing of

equality with the holders of the unpaid part of the debt and in case the property were insufficient to pay the remainder of the debt, the loss would then fall proportionately on creditor and surety. The courts hold that it would be inequitable for a surety, who has guaranteed part of the debt thus to prevent the creditor from getting full satisfaction of his claim. *Gilliam v. Esselman*, 5 Sneed 86 (Tenn. 1857); *Columbia v. Ky. Union R. R. Co.*, 60 Fed. 794 (1894). *Contra*: *Allison v. Sutherlin*, 50 Mo. 274 (1872).

In the principal case the court took the position that section 3468 was a statutory declaration of the equity doctrine of subrogation. Therefore, since the surety had paid only part of the debt it would not be entitled to be subrogated to the rights of the United States to the extent of \$3150 and come in for a *pro rata* distribution of the assets. In arriving at this conclusion the court reversed the decision of the Circuit Court of Appeals (262 Fed. 62) where the court interpreted section 3468 strictly and said the language plainly said that the surety should have "like priority" upon paying the debt to the United States, which could only mean that with respect to any payment made, the surety should have the right *pro tanto* to stand in the place of the United States and go against the debtor on that claim.

TORTS—DAMAGES—MENTAL ANGUISH.—The plaintiff suffered mental anxiety and distress upon learning through her physician that the accident had so injured her heart as to make an urgent operation for a malignant disease impossible of success. *Held*: The mental anguish was the proximate result of her injury and a proper element of recoverable damages. *Halloran v. New England Telephone & Telegraph Co.*, 115 Atl. 143 (Vt. 1921).

The strict rule as to mental anguish is that it must be the direct result or accompaniment of the physical injury suffered by the plaintiff, in order to constitute an element of damage. *Bovee v. Danville*, 53 Vt. 183 (1880); *Chicago City Ry. Co. v. Anderson*, 182 Ill. 298, 55 N. E. 366 (1899); *Thompson on Negligence*, Vol. 6, sec. 7320.

Anxiety over a possible future impairment of health, nevertheless, has been allowed by some courts as an element of damage. Thus mental anguish caused by the fear of hydrophobia from the bite of a dog has been held to be recoverable in damages, *Godeau v. Blood*, 52 Vt. 251, (1880); *Warner v. Chamberlain*, 7 Houst. 18, 30 Atl. 638 (Del. 1884); likewise with the apprehension of blood poisoning from bodily wounds, *Butts v. National Exch. Bank*, 99 Mo. App. 168, 72 S. W. 1083 (1903); *Southern Kansas R. Co. v. McSwain*, 55 Tex. Civ. App. 317, 118 S. W. 874 (1909); and the fear of insanity from partial mental disability, *Walker v. Boston & M. R. Co.*, 71 N. H. 271, 51 Atl. 918 (1902).

It is upon the authority of the class of cases just cited that the court in the principal case allows the plaintiff's mental anguish as an element of damage. The apprehension in the principal case, however, can hardly be said to be that of future injury; the mental anxiety is rather the worry over continued ill health, which possibly might not have continued had the injury not prevented an available cure. There are no cases, it

seems, where recovery for this type of mental anguish has been allowed, and it appears that no cases have arisen wherein a situation at all similar has been involved.

Although the court in the principal case may be correct in holding the anxiety to be the natural and proximate result of the physical injury, it is submitted that it is not as proximate or direct a result as in the cases of fear of hydrophobia, insanity and blood poisoning upon which the court bases its decision. In those cases the apprehension directly and almost automatically followed the injury, whereas in the principal case the anxiety did not arise until the physician had told the plaintiff that the operation was impossible because of the injury to her heart.

The courts have been increasingly liberal in allowing recovery for mental anguish, even where it is not strictly the direct and immediate result of the injury; as in the cases where the plaintiff worried over the future impairment of his earning capacity which the injury may have caused. *Citizens R. Co. v. Braham*, 137 S. W. 403, (Tex. 1911); *Eagan v. Middlesex, etc., R. Co.*, 212 Fed. 562, 131 C. C. 53 (1913); *Ryan v. Oakland Gas, etc., Co.*, 21 Cal. App. 14, 120 Pac. 693 (1913).

The principal case evidently shows the Vermont court's liberality in this general direction and although it widens the application of mental anguish as an element of damage, it seems nevertheless to be a sound and just extension.

TRUSTS—CHANCELLOR WILL NOT APPROVE INVESTMENT BEFORE MADE.—Under Rev. Code of Delaware, 1915, sec. 3875, providing that a trustee may invest in certain kinds of securities and "such other securities as may be approved by the Chancellor," the petitioner, trustee for an insane person, sought the Chancellor's approval in advance of an investment in a personal security not authorized by the statute. *Held*: Petition denied. The Chancellor will not approve an investment in advance. *In re Conwell*, 115 Atl. 309 (Del. Ch. 1921).

In the absence of a statute, the trustee has the privilege of seeking in advance the approval of the court when he is in doubt as to the mode of investment. *Wheeler v. Perry*, 18 N. H. 307 (1846); *Bryant v. Craig*, 12 Ala. 354 (1847); *Snelling v. McCreary*, 14 Rich. Eq. 291 (S. C. 1808). In England the same rule obtains. But there the equity courts have uniformly held that they would approve of real estate securities and securities of the British Government only. *Neale v. Davis*, 5 De Gex. M. & G. 258 (Eng. 1854); *Ex parte Gleaves*, 8 De Gex. M. & G. 291 (Eng. 1856).

Where statutes similar to the one in question have been passed, they have been construed to require the court, on the petition of the guardian or trustee, to approve or disapprove a proposed investment in advance. For example: Ga. Code (1873), Sec. 2330 directing that trust funds may be invested in "stocks, bonds, or other securities issued by this state"

Any other investment must be made under an order of the Superior Court" *Ricks v. Broyles*, 78 Ga. 610, 3 S. E. 772 (1887); Pa. Act of June 13, 1836 (P. L. 599), Sec. 34, providing that the committee of an insane person is personally liable for loss incurred by investment in securities other than real or governmental or those approved

by the court of common pleas, *Hemphill's Appeal*, 18 Pa. 303 (1852); Commonwealth *ex rel.* v. *McConnell*, 220 Pa. 244, 75 Atl. 367 (1910); Ohio, 1 Rev. St. (1890), Sec. 6413, providing that trustees "may invest trust funds in certificates of this state or of the United States or in such other securities as may be approved by the court." *Willis v. Brancher*, 79 Ohio St. 290 (1909).

The principal case is not only *contra* to the weight of authority but also *contra* to the decisions of the same court before the statute in the cases of *In re Bellah*, 8 Del. Ch. 59, 67 Atl. 273 (1896), and *In re Baker*, 8 Del. Ch. 355 (1899). The statute being a codification of the previously existing law, it is difficult to see why the Chancellor did not feel himself bound by it.

VENDOR AND PURCHASER—SALE OF LAND—DESTRUCTION OF BUILDINGS BY FIRE.—Between the time of making the contract and the time fixed for the conveyance a building on the land still in the vendor's possession burned down. *Held*: The vendee must bear the loss. *McGinley v. Forrest*, 186 N. W. 74 (Neb. 1921).

The question as to who must bear the loss through destruction of real estate between the making of the contract and the conveyance is one upon which there is a decided difference of opinion. The rule that the vendee must bear the loss is generally known as the majority rule and from the time of *Paine v. Meller*, 6 Ves. 349, 31 Eng. Rep. R. 1088 (1801), when it was first announced down to the present has been usually followed. *Reed v. Lukens*, 44 Pa. 200, 84 Atl. 425 (1863); *Woodward v. McCollum*, 16 N. D. 42, 111 N. W. 623 (1907); *Felt v. Morse*, 85 So. 656 (Fla. 1920); *Mahan v. Home Ins. Co.* 226 S. W. 593 (Mo. 1920). The reasoning in favor of this rule is that the vendee by the contract becomes the equitable owner and so as real owner must bear the loss. *Pomeroy on Equitable Remedies*, Vol. 2, sec. 2282 (2d ed. 1919).

The contrary view holds that the vendor being unable to perform his contract must bear the loss. *Gould v. Murch*, 70 Me. 288, 35 Atl. 325 (1879); *Powell v. Dayton, etc., R. R. Co.*, 12 Or. 488, 8 Pac. 544 (1885); *Libman v. Levenson*, 236 Mass. 221, 128 N. E. 13 (1920).

However, there is another rule which was relied upon in the dissenting opinion in the principal case. This rule puts the loss on the vendee only if he is in possession and it is followed by the California courts especially, *Higbie & Higbie v. Shields*, 20 Cal. App. Dec. 902, 150 Pac. 801 (1915); and approved of in other jurisdictions. *Good v. Jarrard*, 93 S. C. 229, 76 S. E. 698 (1912); *Elmore v. Stephens-Russell Co.*, 88 Or. 509, 171 Pac. 763 (1918); *Boehm v. Platt*, 189 N. Y. S. 16 (1921); *Williston*, 9 Harv. L. Rev. 122 (1895).

The majority of the court in the principal case has seen fit to follow the doctrine which puts the loss on the vendee even though the vendor is in possession. This view can be logically supported; but it seems that there would be more justice and a closer adherence to what the parties actually had in mind at the making of the contract if the intermediate view were followed. The vendee should not be held responsible for destruction before the land has been put under his control by possession.